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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-145409-001 DT 01/22/2013

JUDGE PAMELA D. SVOBODA

CLERK OF THE COURT
D. Courtemanche
Deputy

STATE OF ARIZONA

SUSAN L LUDER

v.

MAX RAMIRO GARCIA (001)

MAX RAMIRO GARCIA
#254410 ASPC DOUGLAS/MOHAVE
UN
P O BOX 5002
DOUGLAS AZ 85608

APPEALS-PCR
COURT ADMIN-CRIMINAL-PCR

PCR DISMISSED

On July 19, 2009 Petitioner was charged with count 1, Manslaughter a class 2 dangerous felony; count 2 Endangerment a class 6 dangerous felony and count 3 Leaving the Scene of a Fatal Injury Accident, a class 2 felony. After a jury trial, Petitioner was convicted of the lesser offense of count 1, Negligent Homicide a class 4 dangerous felony; count 2 Endangerment a class 6 dangerous felony, and of the lesser offense of count 3 Leaving the Scene of a Fatal Accident a class 3 felony. On June 17, 2010 he was sentenced to 6 years in prison on count 1, concurrent with 2.25 years in prison on count 2, and he received 3.5 years in prison on count 3, consecutive to counts 1 and 2 for a total of 9.5 years in prison. He appealed his conviction and the Court of Appeals upheld his conviction in a memorandum decision. *State v. Max Ramiro Garcia*, No. 1-CA-CR-10-0554 (Ariz. App. October 4, 2011). Counsel was appointed to handle his Petition for Post-Conviction Relief. Appointed counsel reviewed the record and could not find a colorable claim for relief. Subsequently Petitioner filed a *pro se* Petition for Post-Conviction Relief. The Court has read his Petition, the State's Response, and Petitioner's Reply. Petitioner requested an evidentiary hearing. Because the Court does not find there are any issues of material fact, the hearing request is denied. Rule 32.8, Ariz. R. Crim.P.

Counsel for the State argues that the Court should dismiss his Petition as untimely. The Court agrees with Petitioner, however, that the Petition is not untimely as the final order from the Court of Appeals was issued on May 30, 2012 and he filed his Notice of Petition for Post-Conviction Relief on June 14, 2012. Although the mandate issued prior to that, the final order from the Court of Appeals was issued on May 30, 2012. Pursuant to Rule 32.4, Ariz.R.Crim.P Petitioner had thirty days after the issuance of the order to file his Petition. His Petition is, therefore, timely.

It is difficult to ascertain all of Petitioner's claims. As to his claims of prosecutorial misconduct, his argument regarding the indictment, his argument that the trial court abused its discretion, an *Apprendi/Blakely* argument, and all his claims other than ineffective assistance of counsel are precluded under Rule 32.2, Ariz. R.Crim.P. As indicated, Petitioner appealed his conviction and did not assert these claims. Rule 32.2(a)(3) states:

> a. **Preclusion.** A defendant shall be precluded from relief under this rule
>
> based upon any ground:
> (3) That has been waived at trial, or in any previous collateral proceeding.

Because he did not raise these issues in his appeal, they have been waived and he is barred from presenting them now.

Petitioner can assert ineffective assistance of counsel. As to his claim for ineffective assistance of counsel, the court is guided *Strickland v Washington*, 466 U.S. 671, 687 (1984) which established a two part test to determine whether defense counsel's performance was deficient. Courts will reverse a conviction due to ineffective assistance of counsel only when a petitioner shows both 1) that counsel's performance was unreasonable under all the circumstances, and 2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Petitioner has the burden of proving the allegations of ineffective assistance of counsel by a preponderance of the evidence. "*State v. Saenz*, 197 Ariz. 487 (App. 2000). "If a defendant fails to make a sufficient showing on either prong of the *Strickland* test, the court need not determine if the other prong was satisfied." *State v. Febles*, 210 Ariz. 589, 596, 115 P.3d 629, 636 (App. 2005). . Petitioner must present evidence of a "provable reality, not merely speculation". *State v. Rosario*, 195 Ariz. 264, 987 P.2d 56 (App. 1995). There must be some demonstration that the attorney's presentation "fell below that of the prevailing objective standards." *Rosario*, 195 Ariz. at ¶ 23. Petitioner must also present "some evidence of a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different." *Id* (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984)).

As to his ineffective assistance of counsel claim it is difficult to discern his arguments. It appears he argues the following: 1) trial counsel should have presented material facts in a preliminary hearing or to a grand jury; 2) defendant was not at fault for the collision and 3) defendant wanted to testify but counsel instructed him not to testify. He also argues that his appellate counsel was ineffective for failing to raise a *Batson* challenge and for failing to argue that the jury should not have returned a finding of "dangerousness" when they convicted the defendant only of negligent homicide and for leaving the scene of an accident he did not cause. He also argues the Court improperly instructed the jury in the aggravation phase of the trial. As to his claim that his lawyer failed to present material facts or exculpatory evidence in a preliminary hearing or to the grand jury, and his claim that he did not waive his preliminary hearing, the State has the authority to elect how to charge a person with a felony; either through a preliminary hearing or through presentation to a grand jury. A defendant does not get to elect the method by which he will be charged. The State chose to indict the defendant, and an indictment was obtained on July 9, 2009. Therefore counsel was not ineffective for failing to present evidence at the preliminary hearing because one did not occur. As to trial counsel not submitting exculpatory evidence to the grand jury, a Notice of Appearance was filed by trial counsel on July 15, 2009, six (6) days after Petitioner was indicted. Therefore, trial counsel could not ask to present evidence to a grand jury through a *Trebus* letter if he was retained after the issuance of the indictment. As to this claim of ineffective assistance of counsel, Petitioner's claim fails.

Petitioner argues he was not at fault for the collision and his attorney was ineffective in his defense. However, trial counsel was effective. The jury returned a guilty verdict on the lesser offense for count 3, finding that he was not at fault for the collision but he did leave the scene. This argument also fails under *Strickland*.

Petitioner now argues that he wanted to testify at trial and did not do so by advice of counsel. The court will note that he never raised his desire to testify with the trial court. Actions which appear to be a choice of trial tactics will not support an allegation of ineffective assistance of counsel. Thus, "disagreements [over] trial strategy will not support an allegation of ineffective assistance of counsel, provided the challenged conduct had some reasoned basis." *State v. Vickers*, 180 Ariz. 521,526, 885 P.2d 1086, 1091 (1994). A reviewing court should give deference to tactical decisions made by counsel and should refrain from evaluating counsel's performance in the harsh light of hindsight. *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). Petitioner did not invoke his right to testify, and absent some affirmative conduct by counsel that prevented him from doing so, he cannot now blame counsel for that decision. *State v. Schurz*, 176 Ariz. 46, 58, 859 P.2d 156, 168 (1993). His claim here also fails to meet either prong for an ineffective assistance of counsel claim as outlined in *Strickland*.

Petitioner makes several broad, conclusory statements without any supporting facts or argument: His lawyer did not "preserve meritorious claims for appeal" (p. 12); he argues there are "newly discovered facts in evidence that would change the verdict and sentence" (p.13) and his lawyer failed to provide the defense with an expert (p.17). Conclusory assertions will not suffice in a Rule 32 Petition. *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193(App. 2000). Petitioner has not satisfied either prong of *Strickland*.

As to his appellate counsel, he argues they were ineffective for failing to raise a *Batson* challenge, and for failing to argue that the "dangerous" finding by the jury was in error given he was convicted of having only a negligent mental state in the lesser included offense of negligent homicide and he did not cause the collision. He also argues the Court failed to properly instruct the jury in the aggravation phase. "Appellate counsel is not ineffective for selecting some issues and rejecting others. Once the issues have been narrowed and presented, appellate counsel's waiver of other possible issues binds the defendant…" *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). Appellate counsel filed an *Anders* brief, stating that she reviewed the record and found no arguable claim. The Court of Appeals then reviewed for fundamental error and found none. Additionally, Petitioner filed a supplemental brief in *propria persona*. He failed to raise a *Batson* claim, nor did he challenge the Court's instructions in the aggravation phase,nor the jury's findings in his *pro per* brief to the Court of Appeals. By failing to address them in his *pro per* brief to the Court of Appeals, he is precluded from doing so now. Rule 32.2. For the foregoing reasons, it is hereby ordered dismissing the Petition for Post-Conviction Relief.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.